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Phone:		**Date:**	01/21/02
Re:	Microsoft Settlement	**CC:**	

X Urgent ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

● **Comments:**

Please find my letter attached, and contact me if you do not clearly receive all six pages that follow.

Thank you,

Matthew

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January 17, 2002

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I am writing to oppose the 2001 Microsoft Proposed Settlement, addressing Microsoft's monopoly abuse[1], and to ask you to modify it to better address the crime. As stated in the COMPETITIVE IMPACT STATEMENT (CIS)[2], in section VIII:

> The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree.

Unfortunately, this is not the case – the government has breached its duty to the public by not addressing the complete situation. Microsoft is a convicted monopolist, found guilty of purposefully extending its monopoly through an abuse of their existing monopoly (CIS, Section III, A 2). The goal of the settlement should be to address the antitrust violation, as best described in CIS, Section IV. EXPLANATION OF THE PROPOSED FINAL JUDGMENT (PFJ)[3], B. Prohibited Conduct and Anticipated Effects of the Proposed Final Judgment:

> Appropriate injunctive relief in an antitrust case should: (1) end the unlawful conduct; (2) "avoid a recurrence of the violation" and others like it; and (3) undo its anticompetitive consequences.

The main two factors to be considered are prevention (points 1 and 2) and punishment (point 3). Punishment is designed to attempt to remedy the past actions, and prevention is supposed to prevent further abuses, now and in the future. The proposed settlement neither punishes Microsoft nor offers enough hope of preventing further abuses. I hope you see fit to alter the terms to suitably protect the public and punish Microsoft for their repeated, flagrant abuses.

The proposed settlement contains oversight into Microsoft's business practices, but insufficiently allows for quick resolution when they breach the imposed restrictions. The CIS, describing the Section IV of the PFJ, states:

> Enforcement by the United States or plaintiff States may include any legal actions or proceedings that may be appropriate to a particular situation, including petitions in criminal or civil contempt, petitions for injunctive relief to halt or prevent violations, motions for declaratory judgment to clarify or interpret particular provisions, and motions to modify the Final Judgment.

In other words, if Microsoft breaches part of the PFJ then they can be hauled back into court. That is already an option, and is how we got to this stage – and how we had this case drag on for years. It does not provide enough quick response to the breach, since Microsoft will continue to protest their innocence for years if necessary.

Instead, I would propose that Microsoft's new overseers, the Technical Committee (TC), be given the power to inflict financial penalties when a breach of the agreement is committed. Fines would be directed to some counterbalancing force – for example, used to purchase equipment from competitors such as Apple for schools, given to organizations such as the Electronic Frontier Foundation, the Center for Democracy in Technology, or the Free Software Foundation for work against monopolistic practices, or apply the money to a foundation that funds developing applications for a competing operating system such as Linux.

Each fine would be based on a methodology drawn out of the number of TC members that agreed that a breach occurred and their perceived severity of the breach. When a TC member decided a breach occurred, they could impose a fine of up to $1 million. Each of the other TC members would then have the opportunity to modify the fine with a multiplier – from 10 times to $1/10^{th}$ the original fine. Thus, with all three TC members agreeing that a massive, intentional breach had happened the fine could be up to $100 million with both using the maximum 10 times multiple, and if two of the TC members thought the third had no basis for the fine and used the minimum $1/10^{th}$ multiple, the fine could be reduced to $10,000 – pocket change for Microsoft. Multiple breaches could be met with multiple fines.

This system of fines would force Microsoft to take the TC members very seriously, and to make them deal with reducing the abuse in day-to-day dealings. In addition, Microsoft should be forced to publish a full page ad explaining each fine in four major newspapers: the San Jose Mercury News, Washington Post, New York Times, and Wall Street Journal. This would make each fine quite public, so Microsoft could not avoid the negative publicity each time they broke the agreement.

The proposed settlement also contains no punishment for Microsoft's previous, egregious, offenses. In order to "undo [the monopoly's] anticompetitive consequences,"

two items need to be addressed: the ill-gotten gains and the barrier to entry in the operating system area. Handling the ill-gotten gains is the easy part – add on a fine that is distributed among the players described above in paragraph 3 where fines are discussed. As for the amount of the fine, consider half to three-quarters of the company's current liquid reserves. Assuming that many ill-gotten dollars have been plowed into their business acquisitions and code development, the billions of such a fine might serve to chasten an arrogant company without taking away their entire business.

To reduce the barrier to entry in the operating system, middleware, and office application markets, publishing the Application Programming Interfaces (APIs) is a good first step. However, the other items necessary to create seamless replacements to Microsoft middleware are not addressed. In order to address the leverage Microsoft has developed in office applications through the use of their monopoly, the complete file formats to their office documents should be included in the release of information. Since the goal is to make sure that all systems can interoperate with Microsoft's standards, the file formats are a crucial barrier to entry that could be removed with minimal pain. The unnecessary efforts to reverse-engineer the formats and the potential for error with such guesswork could be avoided easily by releasing the protocols. For a more complete examination, see the Boder commentary.[4]

There is no provision in the PFJ for creating any competition in the operating system arena to prevent future abuses. The Justice Department (DOJ) has considered and discarded a structural remedy – splitting the company in two. They also say they have considered variations of licensing the source code to Windows, but based their settlement on whether the restrictions "... would be imposed promptly following a remedies hearing." The decision to craft a settlement based on things Microsoft was willing to accede to immediately points out the great hole in the DOJ argument – if Microsoft approves of a settlement, it is too light a penalty.

There are a number of holes in the settlement that Microsoft can – and given their history, will – manipulate. Microsoft is not restricted from pestering users to reset their computers to the "(Microsoft) Windows Default" settings from any changes that an OEM makes, such as the description of the Clean Desktop Wizard:

> Preservation of OEM Configuration: Subsection III.H.3. prohibits Microsoft from designing its Windows Operating System Products to automatically alter an OEM's configuration choices -- such as "sweeping" the unused icons the OEM has chosen to place on the Windows desktop -- without first seeking confirmation from the user, and from attempting any such alteration before at least 14 days after the consumer has first booted his or her personal computer. Thus, for example, in Windows XP, the Clean Desktop Wizard cannot run at all until 14 days after the first boot

The danger to system management by the DOJ is that there are holes – there is no restriction on how often the "sweep" request is triggered (could be every 5 minutes or on each mouse click) or any requirement that the user may force it to stop asking. Microsoft can simply make a computer uninhabitable with repeated nagging without breaching any section of the agreement, even though it would breach the spirit of the agreement. Eliminating the Clean Desktop Wizard entirely and all Microsoft-triggered "updates" or "tidying" processes would be the only way to ensure that this allowance could not be abused.

Another opportunity for abuse comes in allowing Microsoft to define who can see their APIs and documentation. The restrictions on the security releases in the PFJ omits individuals who are not in business, ad-hoc organizations who wish to collaborate without any formal grouping such as a Linux compatibility team, and technology advocacy groups who would wish to inspect the code without developing any software. From the CIS:

> Subsection III.J.2. permits Microsoft to take certain limited steps to ensure that any disclosure or licensing of APIs, Documentation, or Communications Protocols related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms it makes pursuant to this Proposed Final Judgment is to third parties that have a legitimate need for and do not pose a significant risk of misusing that information. ... [specifically] (b) having a reasonable business need for the information for a planned or shipping product; (c) meeting reasonable and objective standards established by Microsoft for the authenticity and viability of its business;

It is clear that some groups will be eliminated under (b) who do not plan a business use, and that Microsoft can create 'reasonable' standards under (c) that will still exclude some Linux and Free Software developers. Allowing Microsoft to create the standards and judge "reasonable business need" is allowing the fox to guard the hen house.

One major drawback of the documentation release as described in the PFJ is the method of dissemination. Numerous times, the MSDN [network] or its future equivalent are described as the optimal way to share the information. However, accessing MSDN documentation currently requires a Microsoft Passport – in other words, identifying yourself to Microsoft and becoming part of their system. In other words, Microsoft is able to monitor who has access to the specifications. They will know your name and contact information and be able to monitor what the user is looking at, which may dissuade some developers from utilizing the documentation. If the information is truly to be available, it should be available without any prerequirements such as a login and password, browsable from any area and posted for free examination.

Another area ripe for abuse is the use of Reasonable and Non-Discriminatory (RAND) terms for information release. RAND terms may prevent individuals and ad-hoc organizations from being able to utilize Microsoft interoperation. When described in the CIS:

> Section III.I. The overarching goal of this Section is to ensure that Microsoft cannot use its intellectual property rights in such a way that undermines the competitive value of its disclosure obligations, while at the same time permitting Microsoft to take legitimate steps to prevent unauthorized use of its intellectual property.

The challenge is that individuals may not be able to meet the requirements of the licensing conditions. Setting a $10,000 fee for a blanket license may seem reasonable for a public corporation or even a small business who is creating a product, but any individual who is creating software in their spare time would find that an onerous burden. Thus, even 'reasonable' restrictions would still prevent Microsoft's greatest competitor, the people working on Linux and its associated projects, from mustering the license fees.

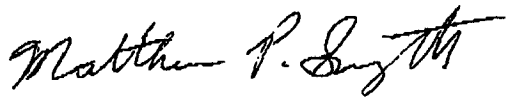
The last area I will address is Microsoft's prevention of the creation of alternatives to the Windows operating system. With sufficiently open APIs, a competitor could generate a program designed to replace Windows but the licensing terms of many Microsoft products would prevent the users from being able to utilize the Microsoft product without breaking the law, due to the licensing restrictions. Also, nothing in the PFJ currently allows access to the APIs for someone building an emulator or alternative operating system. In this manner, Microsoft can prevent their monopoly from being attacked while still abiding by the terms of the settlement. See the Kegel commentary[5] for more details on such observations.

In summary, the PFJ is drawn up with a very pro-Microsoft bias and with very little input from the people it pretends to protect – the public and the people trying to create an alternative to Windows. The goal of the settlement is to punish the lawbreaker and reward the public with a more competitive field of choices, yet the exact reverse has happened. The loopholes and potential for 'creative redefinition' would allow any tech to find methods to let Microsoft avoid the restrictions. This settlement has been roundly condemned by industry watchers such as Robert X. Cringley[6], Dan Gillmor[7], and NetAction[8], consumer advocates such as Ralph Nader[9] and the Attorney General for Massachusetts[10], and technology folk such as the Computer and Communications Industry Association[11] and the GNU Project[12]. It is also being slammed around the technology water-coolers[13], where I hear bitter comments from all sides. Apparently, the bitter feelings extend to others in the DOJ, when Internet News[14] found:

> The DOJ's settlement was brokered by Bush administration appointee Assistant Attorney General Charles A. James, head of the DOJ's antitrust division. But career officials at the Justice Department, who had pursued the case since the

beginning, displayed their apparent displeasure with the agreement by not signing it.

The question becomes: who is happy about this proposed settlement? Not the public. Not the pundits. Certainly not me. Aside from Microsoft, it appears no one is.



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[1] Complaint: http://www.usdoj.gov/atr/cases/f1700/1763.htm
[2] Competitive Impact Statement: http://www.usdoj.gov/atr/cases/f9500/9549.htm
[3] Stipulation and Revised Proposed Final Judgment: http://www.usdoj.gov/atr/cases/f9400/9495.htm
[4] Boder commentary: http://www.ece.cmu.edu/~rtb/msdoj/msdojSettlement.html
[5] Kegel Perspective: http://www.kegel.com/remedy/remedy2.html
[6] http://www.pbs.org/cringely/pulpit/pulpit20011206.html
[7] http://web.siliconvalley.com/content/sv/2001/11/02/opinion/dgillmor/weblog/index.htm
[8] http://www.netaction.org/msoft/winfish2.html
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[12] http://www.gnu.org/philosophy/microsoft-antitrust.html
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